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No. 77-1089

In the Supreme Court of the United States

OCTOBER TERM, 1977

PATRICIA CAMPBELL HEARST, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1–A38) is reported at 563 F. 2d 1331. The supplemental opinion denying rehearing (Pet. A39–A40) is not yet reported. The 11 opinions of the district court are reported beginning at 412 F. Supp. 858.

JURISDICTION

The judgment of the court of appeals was entered on November 2, 1977, and a petition for rehearing was denied on January 4, 1978. The petition for a writ of certiorari was filed on February 2, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether evidence of petitioner's subsequent criminal conduct was admissible to show that petitioner did not act under duress during the period covered by the indictment.

2. Whether petitioner waived her privilege against self-incrimination when she chose to testify in her own behalf.

3. Whether a taped conversation in prison between petitioner and a visitor, routinely recorded pursuant to standard prison security practices, was admissible at trial.

4. Whether the district court abused its discretion in excluding a tape-recorded conversation between petitioner and a court-appointed psychiatrist.

5. Whether the district court abused its discretion by excluding expert testimony offered to corroborate petitioner's testimony that her recitation of certain communiques was coerced and did not reflect her personal beliefs.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of California, petitioner was convicted of armed bank robbery, in violation of 18 U.S.C. 2113(d), and using a firearm to commit a felony, in violation of 18 U.S.C. 924(c)(1). She was sentenced to concurrent terms of seven and two years' imprisonment.* The court of appeals affirmed (Pet. App. A1–A38).

*By imposing concurrent sentences, the district court ignored the requirement that a sentence under Section 924(c) must run consecutively to the sentence imposed for the underlying felony. The district court's error seems insignificant, however, because the conviction under Section 924(c) appears to be invalid in light of this Court's decision in *Simpson* v. *United States*, Nos. 76-5761 and 76-5796, decided February 28, 1978. Petitioner did not raise this issue on appeal and does not raise it now before this Court. The matter may be appropriately resolved through a motion in the district court to vacate the judgment of conviction on the Section 924(c) count.

1. Undisputed photographic evidence presented at trial showed that on April 15, 1974, petitioner, armed with an automatic weapon, accompanied members of the Symbionese Liberation Army (SLA) as they robbed the Hibernia Bank in San Francisco, California (Tr. 95–135). Before the robbery, petitioner, who had been kidnapped by the SLA on February 4, 1974, issued a tape-recorded communique stating that she had adopted the ways of her captors and had chosen to "stay and fight" (Def. Exh. J). Shortly after the robbery, on April 26, 1974, the SLA issued another taped communique in which petitioner acknowledged that she had participated willingly in the bank robbery and that her weapon had been loaded at the time (Gov. Exh. 28).

2. On May 16, 1974, William and Emily Harris, two members of the SLA, were detained for shoplifting inside Mel's Sporting Goods Store in Los Angeles, California. Petitioner, waiting alone outside the store, became aware of the Harris apprehension and discharged an automatic weapon at the store in order to free them. The three then kidnapped Thomas Matthews, a passerby, and stole his van to facilitate their escape (Tr. 846). While riding in the

van, petitioner stated to Matthews that she had voluntarily participated in the robbery of the Hibernia bank and that the gun she carried during that robbery had been loaded (Tr. 851–856).

3. Testifying in her own behalf, petitioner detailed her activities from the date of her kidnapping until September 1974, but said nothing about her whereabouts from that time until September 18, 1975, the day of her arrest (Tr. 1401). She maintained that from the date of her kidnapping until after her arrest all of her actions had been motivated by fear of the SLA (Tr. 1161, 1381, 1461), and she claimed that her participation in the Hibernia Bank robbery had been coerced. On cross-examination petitioner asserted the privilege against self-incrimination when questioned about the period between September 1974 and September 1975 (Tr. 1825–1840).

ARGUMENT

1. Petitioner contends (Pet. 10–14) that the district court erred when it allowed the government to introduce evidence concerning her involvement in the criminal conduct at Mel's Sporting Goods Store. She maintains that that conduct was not similar to the Hibernia bank robbery and therefore was not probative of her intent at the time of the incident charged in the indictment. But as the court of appeals correctly observed (Pet. App. A4–A5):

> [Petitioner's] involvement in the Los Angeles activity was relevant * * * because it tended to show appellant willingly engaged in other criminal activity with persons of the same group at a time not unduly remote.
>
> * * * * *
>
> * * * [T]he relevance of the evidence did not depend on the similarity of the Los Angeles crimes to the bank robbery but on the circumstances surrounding the occurrence of the Los Angeles crimes, which indicated appellant had not acted under duress when she participated in the bank robbery.

The sole issue at petitioner's trial was whether she participated voluntarily in the Hibernia Bank robbery or was coerced into doing so by the SLA. Evidence of the events at Mel's Sporting Goods Store showed that one month after the robbery petitioner had a clear opportunity to escape from her kidnappers but chose instead to defend and rescue them. Accordingly, the evidence was admissible under Rule 404(b), Fed. R. Evid., which provides that evidence of other crimes may be introduced to prove "motive, opportunity, *intent,* preparation, plan, knowledge, identity, or absence of mistake or accident" (emphasis added).[1] In addition, the evidence of the incident at Mel's Sporting Goods Store was admissible because it showed the circumstances surrounding petitioner's

[1] The decision of the court of appeals here is not in conflict with *United States* v. *Beechum*, 555 F. 2d 487, 495 (C.A. 5), which has been reheard *en banc* by the court of appeals, or with *United States* v. *James*, 555 F. 2d 992 (C.A. D.C.), as petitioner claims. Neither of those cases involved a duress defense, and consequently neither court of appeals was required to assess the relevance of evidence of other crimes to a claim that appellant was acting under coercion at the time of the offense for which he was indicted.

confession to Matthews that she had voluntarily participated in the robbery of the Hibernia Bank. See Rule 801(d)(2), Fed. R. Evid.

Petitioner argues (Pet. 12) that at the very least, the government should not have been allowed to introduce this evidence until she had actually asserted the duress defense at trial. The issue of the voluntariness of petitioner's conduct was, however, present from the outset because prior to trial petitioner advised the government that her defense would be based on a claim of duress,[2] and her attorney reiterated this theory in his opening remarks to the jury (Tr. 45, 60–61, 158). In any event, as the court of appeals noted (Pet. App. A8), petitioner's complaint about the presentation of this evidence during the government's case in chief rather than on rebuttal is specious because "the prejudice [to petitioner] arose from the substance of the evidence, not from the timing of its introduction."

2. Petitioner also contends (Pet. 14–21) that the government's cross-examination about the period from September 1974 to September 1975 violated her privilege against compelled self-incrimination. The court of appeals correctly held that she waived that privilege by electing to testify in her own defense.

a. Initially, petitioner claims (Pet. 14–17) that the decision below is erroneous because she was forced to testify in order to rebut the unfavorable inferences

[2] This notice was given several weeks before trial in response to a government motion pursuant to Rule 12.2, Fed. R. Crim. P. See Pet. App. A8 n. 4; Tr. 159–160.

that could be drawn from evidence of her behavior at Mel's Sporting Goods Store. As demonstrated above, that evidence was properly admitted during the government's case in chief. Petitioner's citation of *Harrison* v. *United States*, 392 U.S. 219, is therefore inapposite. In that case, defendant was compelled to testify to rebut wrongfully admitted evidence. See Pet. App. A10–A11.

b. Next, petitioner maintains (Pet. 15–17) that she testified only in reliance on a prior ruling by the district court during a voluntariness hearing held to determine the admissibility of her confession to Matthews. The government questioned petitioner at the hearing about certain incidents during her so-called "lost year," and petitioner invoked the Fifth Amendment. The district court permitted her to assert the privilege and observed broadly that "she has the right * * * to assert that privilege in any proceeding at any time in any place under the Constitution of the United States" (Tr. 473). Petitioner asserts that she would not have testified at trial had it not been for these earlier comments by the district court. The court of appeals correctly found her claim implausible.

In the first place, despite the loose language used, the district court never issued a binding ruling that petitioner's Fifth Amendment privilege was not subject to waiver if she chose to testify.[3] As the court of appeals explained (Pet. App. A18):

[3] Petitioner also alleges (Pet. 16) that the district court issued such a ruling on one occasion other than the voluntariness hearing. But this second putative ruling came *after* petitioner had testified

> [Petitioner] could not reasonably have believed that [the district court's] pronouncement, given in the very limited context of a voluntariness hearing, was a promise to her that she could testify on the merits during the trial without subjecting herself to cross-examination or comment upon her refusal to answer government questions.

Second, the court of appeals found no evidence in the record that petitioner, in deciding to testify, did in fact rely on the district court's statement. Petitioner has identified no such evidence. Given the strength of the government's case, which established beyond question her participation in the robbery, petitioner's "only hope was to testify about her role in the robbery" (Pet. App. A20). The court of appeals was entirely justified in concluding that petitioner "would have testified even if the trial court had ruled at the beginning of the trial that her privilege against self-incrimination was subject to waiver" (*ibid.*).

c. Petitioner argues further (Pet. 17–19) that because her direct testimony related only to the voluntariness of her confession to Matthews, she did not waive the privilege against self-incrimination with respect to events occurring during her "lost year." But, as the court of appeals noted (Pet. App. A12), petitioner's characterization of her own testimony is

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on direct examination (Tr. 1557). She could not, therefore, have testified in reliance on that ruling. See Pet. App. A18–A19 and n. 9.

"completely erroneous." That testimony was intended to show that "from the moment of [petitioner's] kidnapping to the time of her arrest she was an unwilling victim of the SLA who acted under continual threats of death" (*ibid.*). See, *e.g.*, Tr. 1161, 1381, 1412, 1461. Petitioner thus attempted to demonstrate that not only her confession to Matthews but all the behavior about which she testified, including that for which she was indicted, was involuntary. This case is therefore distinguishable from *Calloway* v. *Wainwright*, 409 F. 2d 59 (C.A. 5), certiorari denied, 395 U.S. 909, in which appellant did take the stand "for the limited purpose of repudiating the voluntariness of his [earlier] confession" (409 F. 2d at 64). Here, petitioner testified for the general purpose of establishing a duress defense to the charges against her.

The district court properly permitted cross-examination about the "lost year," because petitioner's conduct during that period was relevant to the credibility of her claim of coercion during the seven months immediately following her kidnapping. See Pet. App. A12–A15. *Brown* v. *United States*, 356 U.S. 148, on which petitioner relies, does not support her position. Indeed, this Court specifically stated in *Brown* that when "a defendant in a criminal case * * * takes the stand and testifies in his own defense, his credibility may be impeached and his testimony assailed like that of any other witness, and the breadth of his waiver is determined by the scope of relevant cross-examination" (356 U.S. at 154–155). Under Rule 611(b), Fed. R. Evid., cross-examination may address "matters

affecting the credibility of the witness," and the district court "may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination." Here, all the government's questions did bear on petitioner's credibility and, in any event, the district court did not abuse its discretion in determining that the questions were "reasonably related" to the matters covered on direct.

d. Finally, petitioner contends (Pet. 19–21) that the district court should not have allowed the government on cross-examination to ask a series of questions that it knew would elicit from petitioner repeated assertions of the Fifth Amendment privilege against self-incrimination. In aid of this argument, petitioner cites several cases (Pet. 20 n. 3, 21), all of which involve deliberate efforts to provoke assertions of a valid, unwaived Fifth Amendment privilege. These cases are inapposite because, as explained above, petitioner waived her privilege against self-incrimination by testifying in her own defense. The government was therefore entitled to challenge petitioner's story on cross-examination and, in particular, to impeach her credibility by asking her the questions that she refused to answer. As the court of appeals aptly observed (Pet. App. A16), if such "refusals could not be put before the jury, the defendant would have the unusual and grossly unfair ability to insulate himself from challenges merely by declining to answer embarrassing questions. He alone could control the presentation of evidence to the jury."

3. Petitioner claims (Pet. 21–24) that a tape-recorded conversation between her and a friend,

Patricia Tobin, should have been suppressed. The conversation took place in the visiting room of the San Mateo County Jail two days after petitioner's arrest. Petitioner and her friend used a telephone-like prison communication system, and their conversation was recorded pursuant to standard prison security procedures (Pet. App. A21, A25 and n. 11). Evidence in the record indicates that petitioner knew her conversation was being monitored (Pet. App. A29 n. 13; Gov. Exh. 128).

The court of appeals correctly held that the district court did not err in permitting the government to cross-examine petitioner and Tobin about the conversation and to read sections of the tape transcript to the jury. In *Lanza* v. *New York,* 370 U.S. 139, 143, this Court stated that Fourth Amendment rights are not violated when conversations between prisoners and visitors are recorded for jail security purposes. Recognizing that the Court's comments in *Lanza* appear dispositive, petitioner argues that the relevant portions of that opinion have not survived the Court's subsequent decision in *Katz* v. *United States,* 389 U.S. 347. But, as both the district court and the court of appeals concluded (412 F. Supp. 888; Pet App. A24), the alleged incompatibility between *Lanza* and *Katz* is illusory. While the Court in *Katz* did say that "the Fourth Amendment protects people not places" (389 U.S. at 351), reference to the place of an alleged Fourth Amendment violation remains relevant in assessing whether the claimant entertained a reasonable

expectation of privacy in connection with the area searched or the materials seized.

In prison, where "official surveillance has traditionally been the order of the day" (*Lanza* v. *New York*, *supra*, 370 U.S. at 143), such an expectation is untenable. This is especially so when prisoners come in contact with members of the public. On such occasions, the court of appeals properly found (Pet. App. A24–A25), the interests of prison security must govern,[4] in the absence of weighty countervailing considerations, such as the need for confidential communication between an attorney and his client.[5] See *United States* v. *Dawson*, 516 F. 2d 796, 805 (C.A. 9), certiorari denied, 423 U.S. 855 (warrantless seizure of note from prison inmate); *United States* v. *Hitchcock*, 467 F. 2d 1107 (C.A. 9), certiorari denied, 410 U.S. 916 (warrantless search of prison cell). Cf. *Procunier* v. *Martinez*, 416 U.S. 396 (speaking with approval of some prison mail

[4] These interests are equally compelling whether the prisoners involved are pretrial detainees or convicted criminals (Pet. App. A24 n. 11). Petitioner cites cases holding that because pretrial detainees are presumed innocent, they retain certain constitutional protections no longer available to convicted criminals. These decisions in no way denigrate the need to maintain prison security even where pretrial detainees are concerned. Indeed, *Rhem* v. *Malcolm*, 507 F. 2d 333, 336 (C.A. 2), cited by petitioner, explicitly states that pretrial detainees may be deprived of their rights to the extent "necessary to assure * * * security of the jail."

[5] Because there was in this case no governmental effort to elicit incriminating statements from petitioner, either directly or through an intermediary, petitioner's claim (Pet. 23 n. 4) that the interception of her conversation deprived her of her Sixth Amendment right to counsel must fail. See Pet. App. A28–A30.

regulation). Moreover, the record evidence indicates that petitioner knew her conversation was being monitored, and thus she did not even have a subjective expectation of privacy.

Petitioner nevertheless maintains (Pet. 23–24) that even if the interception of her conversation was lawful, the tape recording of that conversation should not have been delivered to the Federal Bureau of Investigation and later used by the prosecution. She argues that prison security objectives were fully served by the interception itself and that therefore no further dissemination or use was justified. At the very least, petitioner suggests, the FBI should not have obtained the recording without a warrant. These arguments are insubstantial. As demonstrated above, the monitoring and recording of petitioner's conversation were lawful. The court of appeals properly declined "to mutate the prohibitions of the Fourth Amendment * * * into a code of regulations governing interagency transfer of evidence legitimately in government control" (Pet. App. A27–A28).[6]

[6] *United States* v. *Birrell*, 470 F. 2d 113 (C.A. 2), is not to the contrary. In that case, the city police seized certain papers from a murder victim's apartment. Birrell informed the police that some of the papers belonged to him and asked for their return, to which he was entitled. The federal government, investigating Birrell on other charges, acquired the papers from the city police without a warrant. The court of appeals held that since federal authorities would have needed a warrant to search the victim's apartment for evidence against Birrell, a warrant was also required to obtain the documents from the city police, from whom Birrell had already requested their return. As the Second Circuit's opinion stressed (470 F. 2d at 117), the case turned on its peculiar facts.

4. Petitioner next contends (Pet. 24–25) that the district court abused its discretion when it refused to permit the playing of an entire tape-recorded interview between petitioner and psychiatrist Dr. Louis J. West. The interview occurred shortly after petitioner's arrest, and she wanted the tape played to the jury in order to corroborate Dr. West's testimony concerning her mental condition at that time. She also alleged that the tape would reveal the basis for the opinion testimony of another psychiatrist, Dr. Robert J. Lifton. The government objected on the ground that playing the entire tape would be "cumulative and unnecessary" (Pet. App. A30). The government proposed instead that Dr. West be allowed to read pertinent passages from the interview transcript. The district court sustained the objection and based its ruling on Rule 403, Fed. R. Evid., which provides in part:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed * * * by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The district court's ruling was not an abuse of discretion. Dr. West had already testified fully on the substance of the post-arrest interview (Tr. 1889–1991), and Dr. Lifton also had an opportunity to describe in

It has no applicability here, where the interception of petitioner's conversation was lawful because petitioner herself was a prisoner. Evidence properly obtained from petitioner could properly be used against her.

detail what he had learned from listening to this and other tapes. Playing the entire tape would have consumed an hour and 45 minutes. Under these circumstances, the district court did not err in concluding that the tape would be essentially cumulative. Petitioner has not described how she was prejudiced by the court's decision, and indeed, the challenged ruling left open the possibility of reading or playing relevant portions of the tape. See Pet. App. A30–A32.

5. Finally, petitioner asserts (Pet. 26–27) that the district court erred in excluding expert psycholinguistic testimony that her speech patterns in tape-recorded communiques distributed by the SLA differed from her natural speech patterns and thus indicated that she had not made the recordings willingly.[7] The district court excluded the proffered expert testimony because psycholinguistics has not yet "achieved such general acceptance among psychological and scientific authorities as to justify courts of law in admitting expert testimony on this subject," and because "the significance of the testimony did not warrant the inordinate consumption of time that would have been necessitated" (412 F. Supp. 893,

[7] When the psycholinguistic testimony was proffered to the district court, petitioner indicated that it was intended to prove that she did not write the SLA communiques (Pet. App. A34 n. 16). The government did not dispute petitioner's testimony that the SLA had assisted her in drafting the speeches, but rather argued that she read the communiques with an intensity evidencing genuine endorsement (Tr. 3972, 3977, 3979, 4404–4406, 4408–4409, 4475). The argument that the psycholinguistic testimony was also relevant to petitioner's intent in reading the communiques was raised for the first time on appeal (Pet. App. A34 n. 16).

895; Pet. App. A33–A34). The court of appeals correctly found (Pet. App. A34) that, under Rule 403, the latter basis for the district court's ruling was itself sufficient to establish that the court did not abuse its discretion in excluding the testimony (Pet. App. A34). See *Hamling* v. *United States*, 418 U.S. 87, 125, 127.[8] This is particularly persuasive in view of the court of appeals' conclusion that "the probative value of such evidence was relatively light" (Pet. App. A34).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[8] Petitioner's contention that the court's exclusion of this testimony violated Rule 901(b)(4) is erroneous. Rule 403 gives the trial court discretion to exclude relevant evidence ordinarily admissible where that evidence would be cumulative and cause undue delay. As the court of appeals observed (Pet. App. A34–A35), the district court here properly exercised that discretion.

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